DEC 13 2000

No. 99-1953

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

TRI COUNTY INDUSTRIES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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AMICUS CURIAE BRIEF OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of *amicus curiae* briefs have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury, vindication of civil rights protected under federal and state statutes, and in other actions seeking legal redress.

ATLA's mission includes the preservation of the right to trial by jury for all Americans as guaranteed by the Seventh Amendment. Petitioner in this case questions the validity of a federal appellate court's careful scrutiny of new trial orders which overturn jury verdicts. Because ATLA views such scrutiny as a proper and necessary role for the appellate courts, ATLA respectfully submits this brief as *amicus curiae* in support of the Respondent.

SUMMARY OF THE ARGUMENT

1. The appellate court in this case, reviewing the district court's grant of a new trial based on the excessiveness of the jury's verdict, stated that it undertakes a "more searching inquiry" into such rulings, as distinguished from denials of motions for a new trial.

The appellate court's "more searching inquiry" is not in conflict with this Court's approval of the line of appellate decisions reviewing such new trial rulings under the abuse of discretion standard.

Appellate review of trial court new trial rulings is a fairly recent historical development. At least six circuits have adopted some version of the "more searching inquiry" standard to protect the right to trial by jury. In approving the line of circuit court cases exercising abuse of discretion review of new trial rulings, this Court did not indicate that those circuit cases were inconsistent with its approval.

Moreover, the "more searching inquiry" is consistent with this Court's repeated admonition that, in view of the fundamental importance of the Seventh Amendment right to trial by jury, courts should give "close scrutiny" to any seeming curtailment of that right.

Finally, it does not appear that, even if the court had declined to undertake a "more searching inquiry," the result in this case would have differed. The ordinary abuse of discretion standard employed by the Seventh Circuit, for example, is not equivalent to the lack of appellate review at all.

2. The court of appeals properly applied the well-settled standard of review of new trial orders based on excessiveness which have been used by the circuit courts. Those courts apply a two-step analysis. Courts first inquire whether the trial judge applied the appropriate standard in ruling on the motion for new trial. Second, the appellate court inquires whether the jury verdict was in an amount which a rational jury could find, based on the evidence.

In this case, the district court erred in relying on matters which were not in evidence when determining whether the jury's verdict was excessive. Although the trial judge possesses considerable discretion, the judge may not determine that the jury's verdict is against the great weight of the evidence or grossly excessive by relying upon facts or matters that were excluded from evidence and which the jury did not consider.

The court of appeals applied the appropriate standard for abuse of discretion with respect to the amount of the jury's verdict. Courts have held that denial of a new trial will be upheld -- and grant of a new trial will be reversed as an abuse of discretion -- where the evidence would allow a rational jury to arrive at the verdict. This "rational jury" standard provides an objective check on irrational trial outcomes, and conforms to this Court's announced standard in criminal cases. Its application in this case was proper and appropriate.

ARGUMENT

I. NEW TRIAL ORDERS WHICH OVERTURN JURY VERDICTS WARRANT "MORE SEARCHING INQUIRY" TO PRESERVE THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE SEVENTH AMENDMENT.

A. "More Searching Inquiry" Into a District Court Grant of a New Trial On Grounds That the Jury Verdict is Excessive or Against the Weight of the Evidence Is Consistent With This Court's Approval of Review of New Trial Rulings for Abuse of Discretion.

The appellate court in this case, on appeal from the district court's order granting the District of Columbia's motion for a new trial following a jury verdict, stated that it reviewed the ruling for abuse of discretion. *Tri County Industries, Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000). The court stated that, "because of 'the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function,'" it would undertake a "more searching inquiry" than it would employ on appeal from a denial of a new trial. *Id.*, quoting *Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978).

In short, the court made clear that the Seventh Amendment matters.[2]

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[2] The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Tri County's suit, in the nature of a constitutional tort action, *see Smith v. Wade*, 461 U.S. 30 (1983), sought damages, including the loss of future profits, caused by the District of Columbia's deprivation of its procedural due process rights in suspending its building permit. The jury returned a verdict of $5 million. 200 F.3d at 839-40.

The trial judge determined that the amount of the verdict was grossly excessive, particularly in view of evidence, which the court excluded at trial, suggesting the District might soon have shut down the facility as a result of community resistance. The district court ordered a new trial if Tri County did not agree to remit all but $1 million of the award. Tri County declined. Following the second trial, the court of appeals reversed the order granting a new trial as an abuse of discretion and reinstated the first jury's verdict. *Id.*

The District asserts that the appellate court's "more searching inquiry" conflicts with this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). In that case, this Court expressly approved the practice that had been adopted by every federal circuit -- that new trial orders may be reviewed by federal appellate courts for abuse of discretion. *Id.* at 436. The District argues that a more searching inquiry conflicts with "two fundamental principles" embodied in the *Gasperini* decision: that appellate review is limited to abuse of discretion and that in conducting such review, appellate courts must "give the benefit of every doubt to the judgment of the trial judge." *Pet. Br.* at 25.

Amicus submits that this Court's decision in *Gasperini* does not require the rejection of a measure of vigilance under the abuse of discretion standard to safeguard Seventh Amendment rights. Indeed, recognizing that at least six of the circuits employed a version of the "more searching inquiry" approach under the abuse of discretion standard, this

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Court's general statement of approval may be seen to encompass that line of decisions.

A brief summary of the historical development of appellate review of such new trial rulings demonstrates the validity of the lower court's position.

The determination of the amount of damages in civil actions has historically been the responsibility of the jury, preserved against judicial intervention by the Seventh Amendment. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998). Federal courts possess no general authority to reduce the amount of a jury's verdict, *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889), and any review of jury verdicts for excessiveness must bear in mind that "the federal courts operate under the strictures of the Seventh Amendment." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 n.26 (1989).

The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." More than a century and a half ago, Justice Story stated that the Re-Examination Clause is a "substantial and independent clause" that is even "more important" than the preceding portion of the Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Re-Examination Clause prohibits "the indirect impairment of the right of trial by jury through judicial re-examination of factfindings of a jury other than as permitted in 1791." *Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

For many years, it was held that district court orders to grant or deny a new trial based on claims of excessiveness were essentially unreviewable at the federal appellate level. In 1838, for example, the Court considered it "a point too well-settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if

at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error." *United States v. Laub*, 12 Pet. (37 U.S.), 1, 5 (1838). As late at 1940, the Court stated rather categorically: "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940).

During the mid-20th Century, that rule changed dramatically as, one by one, the circuit courts adopted the position that such rulings were reviewable under the abuse of discretion standard. *See Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2nd Cir. 1961). Within a few years, the law had changed sufficiently that a court of appeals could say that "it is by now standard doctrine that such orders may be reviewed for abuse of discretion." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 147 (D.C. Cir.), *cert. denied,* 396 U.S. 835 (1969).

In applying this standard, the D.C. Circuit in *Taylor* and many of the circuit courts recognized that the scope of review of denials of new trial was fairly narrow because the trial judge's ruling was in agreement with the jury, which bears the constitutional responsibility for the determination of the amount of damages. However, many courts recognized that a district court order granting a new trial raises the potential for legal error that is not present in the denial of new trial: The trial court may have overstepped its authority, which is restricted by the Seventh Amendment, in overturning the jury's verdict.

To protect the litigants' right to a jury trial, the court stated in *Taylor,* it "becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny." *Taylor v. Washington Terminal Co.,* 409 F.2d 145, 148 n. 13 (D.C. Cir.), *cert. denied,* 396 U.S. 835 (1969).

The *Taylor* court acknowledged it was following the

lead of Third Circuit Judge Biggs, who had explained:

> [Where] the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts.

Lind v. Schenley Industries, Inc., 278 F.2d 79, 90 (3rd Cir.), *cert. denied*, 364 U.S. 835 (1960).

Other circuits have followed this lead. *See Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1048 (2nd Cir. 1984) ("we agree with Chief Judge Biggs [in *Lind*] as to the need of particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence"); *Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir. 1981) ("to protect a litigant's Seventh Amendment rights and to prevent improper intrusion on the jury's function . . . somewhat broader review applies to an order granting a new trial as opposed to an order denying such a motion"); *Duncan v. Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied sub nom. Fain v. Duncan*, 389 U.S. 913 (1967); *Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238, 247 (7th Cir. 1992); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972).

The First Circuit appears to hold a similar view. *See Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978) ("an appellate court will exercise 'a closer degree of scrutiny and supervision' where the basis for the new trial is the trial court's evaluation of the weight of the evidence," citing *Lind, Taylor* and *Duncan, supra*). *See also Wells Real*

Estate v. Greater Lowell Board of Realtors, 850 F.2d 803, 811 (1st Cir. 1988) (employing stricter standard "where the motion for new trial is made because the jury's verdict allegedly is against the weight of the evidence . . . because a jury's verdict on the facts should only be overturned in the most compelling circumstances.")

Those Courts have generally adhered to this view subsequent to *Gasperini*. *See Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350 (3rd Cir. 1998); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998); *Holmes v. City of Massillon*, 78 F.3d 1041 (6th Cir. 1996); *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997).

It is true, as the District states, that the Seventh Circuit has recently modified its view. In *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), the court's entire discussion of this issue is as follows:

> However, in light of the Supreme Court's decision in *Gasperini* that an abuse of discretion standard of review does not violate the Seventh Amendment, 518 U.S. at ___, 116 S.Ct. at 2223-24, we hereby abandon this practice as unnecessary. Although we now review with somewhat more deference to the district court, utilizing an ordinary abuse of discretion standard, we find that the district court did abuse this discretion.

It is not readily apparent what the Seventh Circuit saw in *Gasperini* that would suggest that appellate courts might relax their vigilance against possible intrusions by the district courts into the role of the jury. However, the court stopped far short of the position urged by the District of Columbia in this case: That *Gasperini* forbids appellate courts from undertaking a more searching inquiry into grants of new trials that overturn jury verdicts on the basis of excessiveness.

The decisions of these circuits do not deviate from the

two fundamental principles identified by the District. *See* Pet. Br. at 25. All apply the abuse of discretion standard. In addition, the decisions explicitly emphasize the broad, though not unlimited deference accorded to the trial judge by virtue of the judge's position to observe the trial. *See Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969) (recognizing "deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record"); *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1051 (2nd Cir. 1984)(similar); *Evers v. Equifax, Inc.*, 650 F.2d 793, 797 (5th Cir. 1981); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972).

Nor did the *Gasperini* Court, expressly approving the line of appellate decisions allowing review, indicate that the vigilance exercised by these circuits was at all inconsistent with the Court's own view or that they were excluded from the scope of the Court's approval. *See* 518 U.S. at 435-36.

It can scarcely be argued that *Gasperini* even suggests that appellate courts may not employ particular care in circumstances where the district court might have infringed upon Seventh Amendment rights. The very foundation of the Court's carefully tailored application of state law was that "[t]he Seventh Amendment [bears] on the allocation of trial functions between judge and jury," as well as controlling "the allocation of authority to review verdicts." 518 U.S. at 432.

B. The Appellate Court's "More Searching Inquiry" Is Consistent With This Court's Admonition to Scrutinize Carefully Any Infringement of the Seventh Amendment Right to Trial by Jury.

The right of trial by jury in civil cases was vitally important to the colonists, and its absence from the proposed

Constitution nearly led to its rejection. Only a commitment to add a bill of rights, including the right to trial by jury, assured ratification. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-99 (1993); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 667-730 (1973) (reviewing the ratification debates).

The Seventh Amendment right was specifically designed as a check on the power of federal judges. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, C.J., dissenting); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989)(White, J., dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.").

Mindful of this history, this Court has consistently emphasized the fundamental nature of this right and has instructed that "[t]he right of jury trial in civil cases at common law . . . should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 753 (1943). *See also Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded").

In *Dimmick v. Schiedt*, 293 U.S. 474 (1935), where the Court upheld the authority of federal courts to order remittitur on motions for a new trial based on excessiveness of the jury's verdict, the Court cautioned:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

293 U.S. at 486 (1935). The Court had occasion to repeat and reaffirm this principle in *Beacon Theatres, Inc. v. Westover*,

359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). The court of appeals in this case did no more than heed that admonition.

C. Abandonment of the "More Searching Inquiry" Approach Would Not Shield the District Court's Grant of a New Trial from Reversal for Abuse of Discretion.

Finally, it is clear that the District's quarrel with the lower court's decision does not turn on the court's "more searching inquiry." Rather, the District appears to insist that review for abuse of discretion permits virtually no review at all. This is plainly not the import of this Court's decision in *Gasperini*.

For example, it is worth examining the Seventh Circuit's decision in *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), which the District offers as exemplifying the appropriate standard of review pursuant to *Gasperini*. Pet. Br. at 41. The Seven Circuit did abandon its "more exacting" scrutiny of grants of new trials in favor of "somewhat more deference to the district court using an ordinary abuse of discretion standard." 106 F.3d. at 1397. But the court did not place the district court's new trial decision beyond effective appellate review. Indeed, the Seventh Circuit's disposition of that case under "ordinary abuse of discretion" is substantially similar to the D.C. Circuit's disposition in this case.

Medcom was a commercial fraud case in which the jury awarded plaintiff damages for lost profits. The district court granted defendant's motion for a new trial on grounds that the calculations of plaintiff's expert witnesses were too high considering the evidence. The court of appeals held that the district court abused its discretion in granting a new trial:

> The jury awarded $3.5 million for Baxter's misrepresentations regarding the content of the domestic library and $2.225 million for Baxter's misrepresentations regarding the September 30, 1986 balance sheet. These figures were less than MHC sought and less than the calculations provided by MHC's experts. They were, however, within the reasonable range of valuations testified to by MHC's experts and Baxter's experts. As the Appellate Court of Illinois has noted, the law does not require
>
> > that a jury verdict must match either of two experts' figures, or a combination of the assumptions. Rather, all the law requires is that the evidence tend to establish, with a fair degree of probability, a basis for the assessment of damages. . . . The ascertainment and assessment of damages is a question of fact for the jury; although the amount may not be speculative, it need not be proved with mathematical certainty. The jury must bring in a verdict within the range of the valuation testimony presented. . . .
> >
> > *F.L. Walz, Inc. v. Hobart Corp.*, 224 Ill. App. 3d 727, 167 Ill. Dec. 42, 47, 586 N.E.2d 1314, 1319 (1992) (citations omitted).
>
> *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d at 1398 (7th Cir. 1997).

Amicus suggests that, even if the court in this case had employed the standard applied in *Medcom*, as the District suggests, Pet. Br. at 41, the outcome would likely have been no different.

Amicus further suggests that an appellate court should look to whether the trial court applied the correct standard to the claim of excessiveness and, if so, whether the award was one that a rational jury could find based on the evidence. Under that standard, the court of appeals properly held that

the district court abused its discretion in granting a new trial.

II. APPELLATE REVIEW OF A GRANT OR DENIAL OF A NEW TRIAL BASED ON EXCESSIVENESS OF THE VERDICT REQUIRES THE COURT TO ASCERTAIN WHETHER THE TRIAL JUDGE APPLIED THE CORRECT STANDARD AND WHETHER THE AMOUNT WAS ONE THAT A RATIONAL JURY COULD FIND BASED ON THE EVIDENCE BEFORE IT.

Although federal appellate review of new trial rulings based on excessiveness is a comparatively recent development, the circuit courts have applied the abuse of discretion standard in a fairly uniform manner, employing a two-step analysis. First, courts look to whether the trial judge applied the appropriate legal standard, reviewable for error of law. Second, the court reviews the exercise of discretion by determining whether a rational jury could have arrived at the verdict based on the evidence.

One scholar has observed that this development is part of a larger trend among federal appellate courts to exercise a measure of control over trial court decisions that had previously been deemed unreviewable. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial And Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. Rev. 993, 1046 (1986). The standard applied by the courts is a narrow one:

> On appeal, the question is not whether the trial level result is the better or best one but only whether it is a legally permissible one. Review, therefore, is limited to whether the applicable legal principles were identified and applied correctly and whether the findings of ultimate fact exceed the limits of reasonableness.

Id. at 999.

A. The Trial Judge Erred In Ruling the Verdict Excessive On the Basis of Facts That Were Not Admitted Into Evidence or Considered By the Jury.

Under even the most deferential review, a trial court's "discretion must still be exercised in accordance with ascertainable legal standards and if . . . the trial court failed to apply correctly the proper standards, reversal is possible." *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 88 (3rd Cir.), *cert. denied*. 364 U.S. 835 (1960). "Discretionary determinations are also freely reviewable for errors of law, which include the use of an incorrect legal standard in making the discretionary determination." Louis, *supra*, at 1038.

The district court in this case applied an incorrect legal standard in granting the District's new trial motion. The jury returned a verdict for Tri County, awarding $5 million in compensatory damages, including $4.5 million in lost future profits, caused by the District's violation of Tri County's procedural due process rights. The trial judge ruled that there was legally sufficient evidence to sustain the jury's verdict, and so denied defendant's motion for judgment as a matter of law. With respect to lost future profits, however, the trial judge ruled that the jury's verdict was grossly excessive. The district court therefore ordered a new trial unless Tri County accepted a remittitur of the jury's verdict to $1 million. 200 F.3d 839-40.

Judge Robertson made clear that the crucial element in his decision that the verdict was excessive was evidence which he had excluded from trial. The District had argued that, even if Tri County's permit had not been suspended, resistance to the facility by residents of the community would soon have led the District to reverse course. As a result, the district asserted, the facility would not have operated for long, or would not have opened at all. Recognizing the somewhat speculative nature of this argument, the judge

pressed the District for a more concrete showing how community resistance would have caused the District to derail the regulatory approval. The judge excluded the evidence. 200 F.3d at 842

Post-trial, however, the judge stated:

> In addition, the jury's award of some $4.5 million in assertedly lost profits was in any event grossly excessive and shocks the judicial conscience, particularly in view of the realistic prospect, which I did not permit defendants to prove at trial, that there would be continued community resistance to increased dump truck traffic along Bryant Street, where the remediation facility was located, and a very real likelihood that the District of Columbia would have closed down the remediation facility sooner or later in any event, or that it would never have been permitted to commence operations at all.
>
> Accordingly, it is necessary to grant the motion for a new trial.

Pet. App. 13-14.

In short, the judge found the award was against the great weight of the evidence only after adding to the District's side of the scale evidence that was excluded at trial. This, amicus submits, was legal error. "It is a commonplace that a jury verdict must be reviewed in relation to the record before it. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J. concurring).

Moreover, the error was one of constitutional magnitude, amounting to a re-examination of the jury's finding in a manner not in accordance with the common law.

In *Blunt v. Little*, Fed. Cas. No. 1,578, 3 Mason, 102 (1822), Justice Joseph Story held that the authority of trial courts to review jury verdicts for excessive damages and to order remittitur was exercised by the courts at common law.

See Dimmick v. Schiedt, 293 U.S. 474, 482 (1935). In describing the common-law rule, Justice Story quoted from *Chambers v. Caulfiela*, 6 East. 244, 102 Eng. Rep. 1280 (K. B. 1805). There, Chief Justice Lord Ellenborough stated:

> [I]f it appeared to us from the amount of the damages given *as compared with the facts of the case laid before the jury*, that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury.

6 East. at 256, 102 Eng. Rep. at 1285 (emphasis added).

The District asserts that the appellate court's evaluation of the excessiveness of the verdict, based on the evidence in the case rather than on evidence the judge felt should have been admitted, was "unprecedented." Pet. Br. at 44. To the contrary, it is well settled that the trial court considering a motion for new trial on this ground is limited to the record evidence.

> The judge should determine whether the verdict is consistent with the evidence after considering all of the events of trial. The judge must review the evidence, view all the evidence as a whole, and weigh the relative strengths and weaknesses of the evidence. . . . However, the judge is not permitted to merely substitute his or her judgment and determination of the credibility of witnesses for that of the jury.

James W. Moore, et al., MOORE'S FEDERAL PRACTICE §59.13[2][f][3] (3rd Ed. 1998). Nor are courts, on motion for new trial, free to set aside a jury verdict "because judges feel that other results are more reasonable." *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972) (collecting cases).

It is true that the District fared far better on its second

jury trial of this case. However, "'a trial court should not grant a new trial merely because the losing party can probably present a better case on another trial.'" *Ball v. Interoceanica Corp.*, 71 F.3d 73, 76 (2nd Cir. 1995), quoting MOORE'S FEDERAL PRACTICE, *supra*, at §59.08[2].

B. The Court of Appeals Properly Found that the District Court Abused Its Discretion in Overturning the Jury's Award As Grossly Excessive Where the Verdict Was One That a Rational Jury Could Find, Based On The Evidence.

Even where the trial court has applied the correct standard in granting or denying a new trial on the basis of excessiveness, federal appellate courts also review the exercise of the trial court's discretion with respect to the amount of the award. Denial of a new trial will be upheld -- and grant of a new trial will be reversed as an abuse of discretion -- where the evidence would allow a rational jury to arrive at the same verdict.

In this case, having determined that the district court's rulings admitting and excluding evidence were correct, the court determined that the amount of the verdict was within the range supported by the expert testimony and other evidence in the case. 200 F.3d at 842. In so ruling, the court properly applied the standard set forth in *Langevine v. District of Columbia,* 106 F.3d 1018, 1024 (D.C. Cir. 1997):

> [A] jury's determination of damages may only be disturbed if it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.

This "rational jury" standard is widely accepted as the appropriate standard for appellate review of grants or denials of new trials based on excessiveness of the verdict. *See, e.g., Smith v. Kmart Corp.*, 177 F.3d 19, 29 (1st Cir. 1999) ("We

will find an abuse of discretion only if the jury's verdict exceeds any rational appraisal or estimate of the damages that could be based on the evidence before the jury."); *Narcisse v. Illinois Central Gulf R.R. Co.*, 620 F.2d 544, 547 (5th Cir. 1980) (upholding verdict that was "clearly within the universe of possible awards which are supported by the evidence"); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523 (6th Cir. 1990) ("An abuse of discretion standard applies in reviewing the district court's conditional grant of a new trial, and the jury's verdict should be accepted if it was reasonably reached."); *Eastern Natural Gas Corp. v. Aluminum Co. of America*, 126 F.3d 996, 1000 (7th Cir. 1997) (court "will not set aside a jury verdict if a reasonable basis exists in the record to support the verdict.")

This objective standard of review is substantially similar to this Court's announced standard applicable in criminal cases in *Jackson v. Virginia,* 443 U.S. 307, 324 (1979) (proper inquiry is whether "no rational trier of fact could have" reached the same verdict).

Indeed, as this Court has observed with respect to excessiveness review of jury verdicts:

> Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia,* 443 U.S. 307, 324 (1979).

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 n.10 (1994).

The "rational jury" standard provides an objective standard for reviewing the exercise of discretion by the trial court that does not involve the appellate court in impermissible weighing of the evidence, consideration of

matters outside the record, or imposition of the court's own subjective views regarding the verdict. The court of appeals properly and appropriately applied that standard in this case.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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